IN THE SUPREME COURT OF THE STATE OF MONTANA

CAUSE NO. DA 10-0097

LARRY DIMARZIO,

Plaintiff and Appellant,

vs.

CRAZY MOUNTAIN CONSTRUCTION, INC., a Montana corporation, F.L. DYE COMPANY, a Montana close corporation, BRIDGER GLASS & WINDOW, INC., a Montana corporation,

Defendants, Appellees and Cross Appellants.

APPELLEES/CROSS-APPELLANT'S ANSWER AND OPENING BRIEF

On Appeal from the Eighteenth Judicial District, in and for the County of Gallatin,

as Cause No. DV 04-596 ~ Hon. Mike Salvagni

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Montana Rule of Civil Procedure

I. STATEMENT OF ISSUES PRESENTED ON APPEAL

A. Did the district court abuse its discretion when it prevented DiMarzio from calling William M. Lynch, P.E. as an expert in his case in chief?

B. Did the district court err by allowing the jury to reach the question of a breach of contract between DiMarizo and FL Dye?

C. Did the district court err by giving Instruction #23 when no party had invoked the provisions of § 28-2-2101, MCA et seq.?

II. STATEMENT OF THE CASE

On or about August 7, 2003, FL Dye delivered two separate proposals to DiMarzio for review and acceptance to design and install an air conditioning and humidification system for the DiMarzio residence. (*App 1*) DiMarzio indicated his acceptance of FL Dye's proposals by his signature as "customer." *Id.*

FL Dye commenced work on this project September 5, 2003, and concluded work on the project on or about April 13, 2004, after DiMarzio made it clear that FL Dye was not allowed back on the job site and that DiMarzio was not going to pay his outstanding bill. (*TR, Day 5, 91/1-3; App 2*) At that point, his outstanding bill was $10,740. (*TR, Day 5, 99/6-9; App 3*)

Plaintiff and Appellant, DiMarzio, filed suit on October 19, 2004, seeking damages from FL Dye for negligence. On November 12, 2004, FL Dye brought

counterclaims against DiMarzio for breach of contract and *quantum meruit*.

On August 24, 2006, a Second Amended Scheduling Order was signed by the Court. (*App 4)* On November 27, 2006, the District Court set a date for expert disclosures for December 31, 2006. (*CR 67*) DiMarzio filed a "Supplemental Expert Report" on June 20, 2007. (*CR 88*) On July 11, 2007, FL Dye moved to strike DiMarzio's alleged supplemental disclosure on the grounds that it violated the Court's Scheduling Order that mandated "simultaneous disclosure" and that the filing was really the disclosure of an entirely new expert. (*CR 89*) The Court agreed and DiMarzio's new expert was struck. (*CR 92*)

The case went to trial on August 25, 2009. The parties presented their cases over the course of six days, and, after a brief period of deliberation, the jury returned a 12-0 defense verdict, finding the FL Dye was not negligent and that DiMarzio had breached his contract with FL Dye in the amount of $10,740. (*App 5*)

After the trial, the FL Dye briefed the Court concerning FL Dye's request for prejudgment interest on the $10,740 that was awarded by the jury. (*CR 197, 200*) The Court refused to award prejudgment interest. (*CR 209 p. 13-14*) (*App 10*)

DiMarzio filed his Notice of Appeal on March 2, 2010. (*CR 230*) On

March 10, 2010, FL Dye, filed his Notice of Cross-Appeal concerning the issue of prejudgment interest. (*CR 232*)

III. STATEMENT OF THE FACTS

DiMarzio in his Statement of the Facts, includes a litany of facts not relevant to the issues presented in this appeal. With these irrelevant facts, it seems as if DiMarzio is attempting to persuade this Court that there was insufficient evidence to support the jury's unanimous conclusion that FL Dye was not negligent or possibly that DiMarzio did not breach his contract with FL Dye. However, neither of those issues are being appealed by DiMarzio. Rule 12(1)(d), M.R.App.P., requires the parties to include only those facts relevant to the issues presented to this Court for review. FL Dye's "Statement of the Facts" that follows only includes a short section showing that they did present sufficient evidence that a contract was formed between DiMarzio and FL Dye.

On May 14, 2003 Crazy Mountain Construction ("CMC") entered into a contract with Larry DiMarzio to perform work on DiMarzio's residence. On or about August 7, 2003, FL Dye delivered two separate proposals to DiMarzio for his acceptance to design and install an air conditioning and humidification system for the DiMarzio residence. (*App 1*)(*TR, Day 4, 259/3-12)* DiMarzio indicated his acceptance of FL Dye's proposals by his signature as "customer." *Id.* DiMarzio

was on notice on at least two occasions that his payment to CMC was in part for work performed by FL Dye. (*App 6*)

During this time period, DiMarzio repeatedly made contact directly with FL Dye and attended meetings with FL Dye to discuss various issues that he had with the work done by FL Dye. DiMarzio was in attendance along with FL Dye at the initial meeting at his residence. (*TR, Day 4, 247/4-8*) The proposals DiMarzio signed and the original FL Dye plans were delivered to DiMarzio by FL Dye. (*TR, Day 4, 259/9-12; Day 5, 41/25, 42/1-2*) DiMarzio personally contacted Fl Dye concerning issues he had with the plans delivered to him by FL Dye. (*TR, Day 5, 42/7-8*) After delivering to DiMarzio a sample of the ducting depicted in the plan, DiMarzio again contacted FL Dye directly concerning the aesthetics of the ducting of the system and asked to meet with FL Dye to discuss this issue. (*TR, Day 5, 43/8-9, 11-13*) At this meeting, DiMarzio requested a smaller size of ducting than originally proposed by FL Dye. (TR, Day 5, 45/13-16) Fl Dye agreed to reduce the size of the ducting, but specifically noted on the plans that:

> Contractor and <u>*owner*</u> are aware that the 12-inch duct depicted is not per mechanical contractor's recommendation and only a trial to test feasibility.

(*TR, Day 5, 52/1-7*)(*App 7*) These plans were sent directly to DiMarzio from FL Dye via FedEx. (*TR, Day 5, 52/19-20*)

While work commenced on the project, DiMarzio contacted FL Dye directly to discuss problems he perceived with the work of FL Dye two more times and the second call resulted in a meeting with DiMarzio. (*TR, Day 5, 62/17-25; Day 5, 77/9-14*)(*App 8*) Again in March of 2004, another meeting was initiated by a phone call from FL Dye to DiMarzio. (*TR, Day 5, 78/10-14*) DiMarzio admitted through deposition testimony that he contributed 51% to a letter signed by CMC to FL Dye that complained of the work done by FL Dye. (*TR, Day 5, 100/16/25*) In fact, after September of 2003, FL Dye communicated with DiMarzio instead of CMC "the majority of the time." (*TR, Day 5, 101/14-19*)

DiMarzio's actions of personally signing proposals at the invitation of FL Dye, and personally contacting FL Dye concerning performance of the agreements reached, created a valid express and/or an implied contract.

The jury determined that DiMarzio breached his contract with FL Dye and that FL Dye was entitled to damages in the amount of $10,740. The District Court denied FL Dye's request for prejudgment interest because the Court found that "there was no express contract between [DiMarzio and FL Dye]." (*CR* 209 *at p. 14*) The fact that the jury determined that a contract existed between DiMarzio and FL Dye led the Court to erroneously conclude that the amount due became certain only when the jury found the contract existed. *Id.*

IV. STANDARD OF REVIEW

ISSUE A. "A district court possesses broad discretion in ruling on the admissibility of expert testimony, and without a showing of abuse of discretion, the district court's ruling will not be disturbed on appeal." *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 68, 338 Mont. 259, 165 P.3d 1079 (citing *State v. Vernes,* 2006 MT 32, ¶ 14, 331 Mont. 129, 130 P.3d 169.

ISSUE B. "Motions for a directed verdict are properly granted only when there is a complete absence of any evidence to warrant submission to a jury such evidence and all inferences being considered in the light most favorable to the party opposing the motion." *Allison v. Town of Clyde Park*, 2000 MT 267, ¶ 27, 302 Mont. 55, 11 P.3d 544 (citing *Ryan v. City of Bozeman,* 279 Mont. 507, 510, 928 P.2d 228, 229-30 (1996)). Denial of a directed verdict warrants *de novo* review. *Tacke v. Energy West, Inc.*, 2010 MT 39, ¶ 16, 355 Mont. 243, 227 P.3d 601 (citations omitted).

ISSUE C. "Our standard of review relating to discretionary trial court rulings, such as the giving of jury instructions, is whether the trial court abused its discretion." *Edie v. Gray,* 2005 MT 224, ¶ 12, 328 Mont. 354, 121 P.3d 516; *see also Payne v. Knutson,* 2004 MT 271, ¶ 14, 323 Mont. 165, 99 P.3d 200 (stating that "[w]e give great leeway to the district courts in instructing the jury"). In

reviewing whether a particular jury instruction was properly given or refused, this Court considers the instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial. *See Kiely Const., L.L.C. v. City of Red Lodge,* 2002 MT 241, ¶ 62, 312 Mont. 52, 57 P.3d 836.

V. ARGUMENT

A) THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT PREVENTED DIMARZIO FROM CALLING WILLIAM M. LYNCH, P.E. AS AN EXPERT IN HIS CASE IN CHIEF.

DiMarzio filed his Complaint against the Defendants on October 19, 2004. After a variety of motions to extend the date of expert disclosure were granted by the District Court, the Court set December 31, 2006, as the date for the parties to file their disclosures. On December 26, 2006, DiMarzio disclosed Mr. Kevin Amende, E.I.T. (*CR 69*) Amende was hired to "review and evaluate the designed and installed air-conditioning system along with the current condensation issues observed in the atrium of the DiMarzio residence. " *Id.* This was work performed by FL Dye. FL Dye concedes that there is no question that the disclosure of Amende met the requirements of the Court Scheduling Order, its local rules and Rule 26(b)(4), M.R.Civ.P.

However, subsequent to the close of discovery in this matter and without motioning the Court or consulting with opposing counsel as was done previously,

DiMarzio filed a "Supplemental Expert Disclosure" on June 20, 2007, almost 6 months after the deadline for the disclosure had passed. (*CR 88*) In reality, the "Supplemental Expert Disclosure" did not supplement any previous expert report produced by DiMarzio or even mention any previous report or expert that it was purportedly supplementing. In fact, the Disclosure actually revealed an entirely new expert: Mr. William M. Lynch, P.E. who was now hired "...to review the installed sunroom air-conditioning system and evaluate modifications proposed by [FL Dye] intended to resolve a shortage of airflow which prevents the system from operating." *Id.* In other words, although DiMarzio did not reveal his true intentions, the truth was that Lynch was actually hired to replace Amende. FL Dye moved to strike Lynch. (*CR 89*)

The Court's Scheduling Order stated that:

> Exchange list of expert witnesses and associated exhibits. State the substance of anticipated expert testimony. State the substance of anticipated expert testimony. Constant supplementation is required. NOTE: This Court requires simultaneous disclosure of all proposed expert witnesses, together with a comprehensive statement of the proposed expert's opinions/testimony, and a comprehensive statement of grounds/opinions for the expert's opinions/testimony. Failure to comply may result in imposition of sanctions.

(*App 4*) Equally binding on the parties was the Court's warning to all involved as set forth in its Local Rule 5F entitled "Filing Deadlines" which follows:

> "Filing and scheduling order deadlines will be **strictly** adhered to unless a written motion for extension has been received and approved by the Court."

(Emphasis added.)

The District Court brushed aside DiMarzio's argument that the disclosure of Lynch was somehow a supplementation of the earlier Amende disclosure. (*CR 92 at 3-4*) Instead the Court concluded that Lynch was a new expert that was not simultaneously disclosed by DiMarzio on the date ordered by the Court. *Id.* at 4-5.

On May 13, 2009, DiMarzio again tried to convince the District Court that he should be able to use Lynch as an expert in his case in chief by motioning the Court to use Lynch at trial. (*CR 134*) This time DiMarzio at last revealed that his true intentions were not using Lynch as a supplement to his Amende disclosure as he previously stated, but was instead a complete replacement for Amende. The only reason that has ever been given for this substitution was that Amende "developed a conflict with DiMarzio such that [he] will not be testifying as an expert witness at the trial." (*CR 96 (see Amende Affidavit, ¶ 4)*) What this conflict was about, or why it necessitated the complete replacement of Amende was not revealed to assist the Court. This unsubstantiated "conflict" not enough to even amend the Scheduling Order. (*See* Rule 16(b), M.R.Civ.P. ("[a] schedule shall not be modified except by leave of the judge upon a showing of good cause") In either

case, the Court found this new motion simply a "motion for reconsideration" and denied it based on its earlier reasoning. (*CR 140*)

This Court has precluded experts in situations in less egregious cases where the precluded party timely revealed their expert, but failed in other procedural requirements. In *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, the defendant failed to specify the facts and opinions upon which many of the experts would testify. *Sunburst*, ¶ 20. The District Court precluded the defendant's experts from testifying on the grounds that the defendant had not adequately disclosed the basis for these witnesses' expert opinions. *Id.* at ¶ 22. This Court affirmed the District Court's decision.

In *Nelson v. Nelson* 2005 MT 263, 329 Mont. 85, 122 P.3d 1196, although disclosing the names of the experts and conclusions as to what these experts would testify about, the defendant failed to disclose the substance of the facts and opinions concerning these conclusions. The disclosure also failed to provide facts to demonstrate how the experts had arrived at their conclusions. *Nelson*, ¶¶ 28-29. The District Court precluded the experts from testifying. *Id.* This Court once again affirmed the District Court's decision.

In *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶ 21, 296 Mont. 197, 988 P.2d 1230, the plaintiff provided no legitimate reasons for his inadequate but

timely disclosure of his expert. This Court first reiterated its interpretation of Rule 16(f), M.R.Civ.P., that "a party can be sanctioned if he or she 'fails to obey a scheduling or pretrial order.'" *Id.* This Court went on to point out that:

> In reference to Rule 16(f), M.R.Civ.P., Rule 37(b)(2)(B), M.R.Civ.P., allows a court to 'refuse [ ] to allow the disobedient party to support or oppose designated claims or defenses, or prohibit[ ] that party from introducing designated matters in evidence.'
>
> We regard with favor such sanctions for failure to comply with the rules of discovery. The purpose of these sanctions is to deter parties from being unresponsive to the judicial process regardless of the intent, or lack thereof, behind such unresponsiveness.

Id. Citing *McKenzie v. Scheeler*, 285 Mont. 500, 506, 949 P.2d 1168, 1171-72 (1997); *Huffine v. Boylan* , 239 Mont. 515, 517, 782 P.2d 77, 78 (1989); and *Owen v. F.A. Buttrey, Co.*, 192 Mont. 274, 279-80, 627 P.2d 1233, 1236 (1981).

Seal, as in our case, argued that the District Court's sanction of not allowing him to utilize this expert was too severe since he did not intend to cause a delay or to deny the defendant adequate time to prepare his case. *Id.* Also, as in our case, *Seal* argued that any delay he caused did not prejudice the defendant because the defendant had adequate time to depose the expert or to submit interrogatories regarding the expert's proposed testimony. *Id.* Despite all of the reasons given to excuse the improper conduct, the Supreme Court held that the District Court "is in the best position to know whether parties are disregarding the rights of opposing

parties in the course of litigation and which sanctions for such conduct are most appropriate." *Seal*, ¶ 26 (citations omitted). The Court then concluded that the District Court did not abuse its discretion in preventing the expert to testify. *Id.* (See also, *Rocky Mountains Enterprises, Inc. v. Pierce Flooring*, 286 Mont. 282, 298-99, 951 P.2d 1326, 1336-37 (1997), where the Court affirmed the District Court's decision to strike a party's supplementation designation of an expert witnesses one month before trial and two months after the scheduling order required disclosure.)

DiMarzio cites *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, 327 Mont. 146, 112 P.3d 1018, to support his contention that the District Court erred by not applying his "practical solution in light of the circumstances." (Brief, p. 18) However, *Tripp* is factually opposite.[1] In *Tripp*, the eventual expert was first disclosed as a lay witness six months before trial and two weeks before trial that he was an expert

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1 The only factually similar distinction between *Tripp* and this case is left completely out of DiMarzio's argument. In our case, as in *Tripp,* the District Court eventually allowed Lynch to testify...albeit, as a rebuttal witness. The Court ordered that Lynch could testify to rebut any implication that a remedy proposed by Fl Dye (installation of toe kicks) would have solved the air conditioning issues suffered by DiMarzio. (*TR, Day 5, p. 201*) Lynch was also able to testify to issues that went to FL Dye's alleged negligence. He testified that it was his opinion that the air conditioning duct work, installed and drawn up by Fl Dye, "wasn't arranged in the same manner that it had been previously shown on a drawing the way it was proposed to go in." *Id. at p. 212* Lynch also testified that the "reversal of ductwork meant there was very little supply duct and it was in an awkward location." *Id. at p. 213.* And finally, the Court allow Lynch to testify that the toe kicks suggested by FL Dye "would create a cold drafts across the floor." *Id. at p. 215.*

witness. *Tripp,* at ¶ 18. Nothing like that happened in this case. The point of having "simultaneous" disclosure is to put the parties on equal footing on the date ordered by the District Court. Judge Salvagni put it best: "To allow parties to [disclose experts after the deadline for disclosing experts has passed] would render the deadline for simultaneous disclosing experts meaningless." (*CR 9*) (See also, *First Citizens Bank v. Sullivan*, 2008 MT 428, ¶ 29, 347 Mont. 452, 200 P.3d 39 (citing *Nelson v. Nelson,* 2005 MT 263, ¶ 32, 329 Mont. 85, 122 P.3d 1196 ("We have, on a number of occasions, affirmed the authority of a district court to exclude expert testimony as a result of failure to properly disclose the expert witness.")

Three years after *Tripp*, in *First Citizens* this Court reached an opposite result. In *First Citizens*, the plaintiff's expert was excluded from testifying based on the late disclosure of their expert. *First Citizens*, ¶ 27. The plaintiff argued that its excluded witness should have been able to testify since he was earlier disclosed as a lay witness. *Id.* This Court applied no test and had no comment in concluding that the district court did not abuse its discretion and that: "Failure to disclose an expert witness will usually prejudice the opposing party." *Id.* at ¶ 29 (citing *Superior Enterprises, LLC v. Montana Power Co.,* 2002 MT 139, ¶ 18, 310 Mont. 198, 49 P.3d 565.)

The Scheduling Order in this case clearly stated that the District Court "requires simultaneous disclosure of all proposed expert witnesses." (*App 4*) DiMarzio's belated, and less than forthcoming attempt to switch his experts because of a conflict that he developed with his properly disclosed expert, does not give rise to another bite at the apple. In *Sithon Maritime Co. v. Holiday Mansion* 1998 WL 433931, *1 (D.Kan.,1998), the Court granted a motion to amend the scheduling order based on the representation that the original expert would not be available at trial. The Court held:

> This ruling does not mean, on the other hand, that the court will be inclined to allow the substitution of an expert witness without substantiated, good reason having been shown for doing so. To allow such substitution over objection without a showing of valid reason would indeed allow a party to substitute an expert merely to overcome the criticism of an opposing expert witness. That kind of process could go on endlessly, each party by successive substitutions seeking to finesse the criticism of the other.

Id. See also, *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 385-86 (S.D. N.Y. 2003), judgment aff'd, 99 Fed. Appx. 274 (2d Cir. 2004) (denying plaintiff's motion to substitute a new "valuation" expert or permit another previously designated expert to submit a supplemental report to cover the new "valuation" and stating that "Plaintiffs do not get a 'do-over.' ")

The District Court's decision to exclude DiMarzio's expert for violating the Court's Scheduling Order should be affirmed.

B) DID THE DISTRICT COURT ERR BY ALLOWING THE JURY TO REACH THE QUESTION OF A BREACH OF CONTRACT BETWEEN DIMARIZO AND DEFENDANT FL DYE?

DiMarzio argues that the issue as to whether a contract existed between FL Dye and DiMarzio should never have reached the jury; and as such, his motion for a directed verdict should have been sustained.

FL Dye has maintained a breach of contract counterclaim against DiMarzio for his failure to pay the balance he owed them from the time FL Dye first answered DiMarzio's Complaint way back on November 11, 2004.[2] Despite the fact that FL Dye testified that their contract was only with CMC, the jury was not presented with any written contract between FL Dye and CMC leaving them to decide whether it was DiMarzio or CMC that FL Dye had its contract with. The jury was not persuaded that the contract was with CMC and FL Dye, and instead

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2 In response to DiMarzio's assertion in a footnote that FL Dye did not raise the issue of an implied contract until the end of the trial, FL Dye at all times claimed a contract existed. (*CR 34 at p. 5*) Not only that, Dye, on August 4, 2009, on the date required for submission of instructions, FL Dye provided an instruction on implied contracts that became Jury Instruction No. 22. And contrary to DiMarzio's assertion, the more specific instruction on implied contracts offered by FL Dye at the end of trial was refused. (*TR, Day 5, 295, 296*) DiMarzio at no time objected to the inclusion of an implied contract on the basis that it was untimely raised and cannot assert such an argument now. *In re A.N.W.*, 2006 MT 42, ¶ 41, 331 Mont. 208, 130 P.3d 619.

found that a contract existed between DiMarzio and FL Dye, and that the contract was breached by DiMarzio causing damages to FL Dye in the amount of $10,740. (*App 5*) (See *Allison*, ¶ 27("[T]he courts should exercise the greatest self-restraint in interfering with the constitutionally mandated processes of jury decisions.") (citing *Ryan*, 279 Mont. at 510, 928 P.2d at 230)).

The elements to prove the elements of an express and/or an implied contract is the same:

> It is well established that the essential elements of a contract, whether written or oral, are: 1) identifiable parties capable of contracting; 2) consent of these parties; 3) a lawful object; and 4) sufficient cause or consideration.

Hanson v. Water Ski Mania Estates, 2005 MT 47, ¶ 20, 326 Mont. 154, 108 P.3d 481 (citing § 28-2-102, MCA) "The elements required to establish an implied contract are: identifiable parties, consent, a lawful object and consideration." *C B & F Development Corp. v. Culbertson State Bank*, 256 Mont. 1, 6, 844 P.2d 85, 88 (1992). (But see, *In re Marriage of Rock*, 257 Mont. 476, 479, 850 P.2d 296, 298 (1993) ("lack of consent is irrelevant to an implied contract."))

Here, we have a host of facts and exhibits that support the jury's conclusion that a contract, either express or implied, existed between FL Dye and DiMarzio. FL Dye made an offer to install air conditioning and humidification into the DiMarzio home that was accepted by DiMarzio by his signing of two proposals

submitted to him by FL Dye. (*App 1*) The proposals that DiMarzio accepted labeled him as the "customer." *Id.* The actions of DiMarzio and FL Dye constitute offer and acceptance of an express contract to install an air conditioning and humidification system for DiMarzio. Section 28-2-103, MCA. Further, the consideration for this contract was the work performed by FL Dye to the benefit of DiMarzio. (Section 28-2-801, MCA) (See also, *Ragland v. Sheehan*, 256 Mont. 322, 326-327, 846 P.2d 1000, 1003 (1993)("If an agreement contains a bargained-for exchange in legal positions between parties, the agreement becomes a legally enforceable contract. It is not essential that consideration should impose a certain gain or loss to either party; it is sufficient that a party in whose favor the contract is made foregoes some advantage or benefit.")(citations omitted).

In addition, as detailed above, the conduct of both DiMarzio and FL Dye in making direct contact with each other to discuss the details and the performance of the contract, demonstrates the existence of and the ratification of an implied contract. Section 28-2-103, MCA ("An implied contract is one the existence and terms of which are manifested by conduct.") and 28-2-304, MCA ("A contract which is voidable solely for want of due consent may be ratified by a subsequent consent.")

The fact that FL Dye's representative testified that its contract was only with

CMC, goes only to the weight of the evidence that was submitted to the jury along with the rest of the testimony and evidence that clearly proved the existence of a contract between FL Dye and DiMarzio. (Compare, *Warnack v. Coneen Family Trust*, 278 Mont. 80, 85, 923 P.2d 1087, 1090 (1996)("Although [defendant] has pointed to additional or contradictory evidence in the record, we will not substitute our judgment for that of the trial court where the issue relates to the weight given to certain evidence or the credibility of the witnesses.")(citing *Taylor v. State Compensation Ins. Fund*, 275 Mont. 432, 437-38, 913 P.2d 1242,1245 (1996) (citing *Burns v. Plum Creek Timber Co.*, 268 Mont. 82, 84, 885 P.2d 508, 509 (1994)).

DiMarzio's actions of personally signing proposals as the "customer" of FL Dye, and personally contacting FL Dye concerning performance of the agreements reached, created a valid implied contract in addition to an express contract. With all inferences being considered in the light most favorable to FL Dye, there was clearly evidence to warrant submission to the jury as to the existence of a contract between Fl Dye and DiMarzio. See *Allison*, ¶ 27. Under this contract formed between the parties, DiMarzio is personally liable to FL Dye for the full amount of the outstanding debt he incurred.

C) DID THE DISTRICT COURT ERR BY GIVING INSTRUCTION #23 WHEN NO PARTY INVOKED THE PROVISIONS OF § 28-2-2101, MCA ET SEQ.?

Instruction No. 23 stated:

> Performance by a contractor of a construction contract in accordance with the provisions of the contract entitles a contractor to payment from the owner.

DiMarzio admits that this instruction was an accurate recitation of § 28-2-2102(1), MCA, but objects to its inclusion in this case because the remaining portions of the "Prompt Payment Act" were not triggered to entitle the jury to hear this instruction.

The fact that the wording of the instruction came from a broader statutory framework does not take away from the fact that it is a correct statement of the law. DiMarzio provides no authority to suggest that jury instructions may not be taken from broader acts, even if they are correct statements of law. The District Court properly gave this instruction as it believed that it was necessary for the jury's information in rendering a verdict. Section 25-7-301(5), MCA.

DiMarzio claims he was prejudiced because he believes the instruction gave the "jury the incorrect impression that contractors have some higher status than owners when it comes to breach of contract claims."[3] This Court has recognized

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3 Further, in reviewing all of the instructions provided to the jury, FL Dye asks the Court

that in appeals concerning the trial court's instructions to the jury, the appellant must establish prejudice from the erroneous instruction. *Payne v. Knutson*, 2004 MT 271, ¶ 17, 323 Mont. 165, 99 P.3d 200 (citations omitted)("We give great leeway to the district courts in instructing the jury, and therefore will only overturn a jury instruction in the case of an abuse of discretion.") *Payne*, ¶ 14.)

It was within the province of the jury to decide whether FL Dye had performed its contract in accordance with its provisions to be entitled to payment from DiMarzio. The jury unanimously decided that is exactly what happened. (*TR, Day 6, 151-154*) DiMarzio's claims that a unanimous jury verdict on the issues of contract would somehow be changed if the instruction didn't refer specifically to "contractors" is pure speculation. *Payne*, at ¶ 18. The District Court's decision to include Instruction No. 23 should be affirmed on appeal.

VI. CONCLUSION

This Court should affirm the District Court on all issues raised above. The District Court did not abuse its discretion in refusing DiMarzio from replacing his expert based on a violation of the Court's Scheduling Order. The District Court's

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to also review Instructions No.'s 25 and 26, which clearly gave preferential treatment to DiMarzio – and thus, balances out any claimed preference given to FL Dye stemming from Instruction No. 23. (*App 9*)

decision was well reasoned and this Court should uphold the discretion of the lower Court. This Court should also affirm the District Court's decision to allow the issue of whether a contract existed between FL Dye and DiMarzio to reach the jury. All evidence necessary to form a contract between the parties was presented to the jury and their decision, after six days of hearing this matter, should not be abrogated. Finally, the District Court's decision to give to the jury Instruction No. 23 should be affirmed as it was proper in light of its connection with the other instructions given and with the evidence introduced at trial.

VII. CROSS-APPEAL BRIEF

Pursuant to 12(4), M.R.App., FL Dye includes in this single pleading its cross-appeal brief in support of the matters asserted in its Notice of Cross Appeal, dated March 9, 2010.

VIII. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT ON CROSS APPEAL

This case requires the Court to consider the award of prejudgment interest borne from a contract entered into between DiMarzio and FL Dye on or about August 7, 2003. The jury found that DiMarzio and FL Dye had entered into a contract that was subsequently breached by DiMarzio causing damages to FL Dye in the amount of $10,740. (*App 5*) The District Court denied FL Dye's request for prejudgment interest.

There existed an underlying monetary obligation for the work unpaid by DiMarzio to FL Dye in the amount of $10,740. The amount of recovery is certain, or capable of being made certain by calculation, by simply adding up the two unpaid invoices. (*App 3*) The right to recover the balance owed to FL Dye was made certain by the date of the last unpaid invoice, April 26, 2004. Finally, the payment of prejudgment interest will meet the primary objective of the

prejudgment interest statute by fully compensating FL Dye.

IX. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the District Court erred in denying the award of prejudgment interest to FL Dye.

X. STANDARD OF REVIEW

"We review a trial court's conclusion of law for correctness." *Swank Enterprises, Inc. v. All Purpose Services, Ltd.*, 2007 MT 57, ¶ 14, 336 Mont. 197, 154 P.3d 52 (citing *Ramsey v. Yellowstone Neurosurgical Assocs.*, 2005 MT 317, ¶ 18, 329 Mont. 489, 125 P.3d 1091). "We review a trial court's findings of fact to determine whether substantial credible evidence supports them, the court misapprehended the effect of the evidence, or we are left with a definite conviction that a mistake has been committed." *Id.* (Citing *Knutson v. Schroeder,* 2008 MT 139, ¶ 15, 343 Mont. 81, 183 P.3d 881.)

XI. ARGUMENT

A) The Supreme Court Should Reverse The District Court's Decision, who Found That FL Dye Is Not Entitled to Prejudgment Interest On Its Award.

The jury found that DiMarzio breached his contract with FL Dye, and as a result, awarded damages in the amount of $10,740. This is the exact total of the

last two unpaid invoices of $7,426.00 and $3,314.00. (*App 3*)

Section 27-1-211, MCA, entitles a person to prejudgment interest if the following three criteria are established: (1) the existence of an underlying monetary obligation; (2) the amount of recovery is certain or capable of being made certain by calculation; and (3) the right to recover the obligation vests on a particular day. *James Talcott Const., Inc. v. P & D Land Enterprises*, 2006 MT 188, ¶ 40, 333 Mont. 107, 141 P.3d 1200 (citing *Ramsey v. Yellowstone Neurosurgical Assocs.*, 2005 MT 317, ¶ 19, 329 Mont. 489, 125 P.3d 1091). However, "[t]he fact that a claim is disputed does not make it uncertain," as long as the damage amount is reduced to certainty on a particular day. *Swank*, ¶ 39 (citations omitted). The reasoning behind awarding prejudgment interest follows:

> [T]he objective of fully compensating the injured party, and that is the primary objective of the prejudgment interest statute, should predominate over other equitable considerations. If the legislature has chosen to provide a right to prejudgment interest (§ 27-1-211), the primary objective of the courts, where possible, should be to award prejudgment interest.

James Talcott, ¶ 43, (citing *Bldg. Service, Inc. v. Holms* (1985), 214 Mont. 456, 469, 693 P.2d 553, 560).

In our case, the Court denied FL Dye's request for prejudgment interest because the Court found that FL Dye's right to recover the contract damages did

not vest until the jury rendered its decision as to whether a contract existed with DiMarzio and whether that contract was breached. (*CR 209 at p. 14.*) The District Court erred in its decision.

First, it is important to note that we have no idea under what type of contract theory the jury awarded contract damages to FL Dye. The Special Verdict Form only asked whether there was a contract between FL Dye and DiMarzio, and then whether that contract was breached. The jury could have found that there was a contract based on the two proposals signed by DiMarzio as detailed in argument in Issue B *supra*.

In *LHC, Inc. v. Alvarez*, 2007 MT 123, 337 Mont. 294, 160 P.3d 502, the Court determined that prejudgment interest was proper when the underlying monetary obligation was the balance remaining for materials provided to Alvarez's property. *LHC,* ¶ 30. This was the conclusion reached by the Court even though LHC's calculations differed from the Court's but "was still capable of being made certain by calculation." *LHC*, ¶ 31.

Here, the jury found that DiMarzio breached his contract with FL Dye, and as a result, the jury found the total amount of damages to be $10,740, a difference of $206 from what FL Dye requested in their Complaint. This is the exact total of the last two unpaid invoices admitted at trial of $7,426.00 and $3,314.00 (*App 3*).

The right to recover the balance owed to FL Dye was made certain by the date of the last unpaid invoice, April 26, 2004. As in *LHC*, the monetary balance remaining for the materials and labor provided to DiMarzio's property was capable of being made certain by calculation.

Even if the contract was based on an oral or implied contractual theory, in *Ramsey v. Yellowstone Neurosurgical Associates, P.C.*, 2005 MT 317, 329 Mont. 489, 125 P.3d 1091, the Court found that prejudgment interest was proper because an *oral* agreement existed between the parties to pay a certain amount to the plaintiff and that this amount was known by the defendant "on the day that [plaintiff] billed its patients." *Ramsey*, ¶ 21. (See also, *James Talcott*, at ¶ 43, prejudgment interest can be available even when there is no account stated or fixed contract price).

Ten percent interest is the proper interest rate for prejudgment interest. *In re Marriage of DeBuff*, 2002 MT 159, ¶ 43, 310 Mont. 382, 50 P.3d 1070 ("[T]he most appropriate rate for prejudgment interest pursuant to § 27-1-211, MCA, is the same rate provided for post judgment interest pursuant to § 25-9-205, MCA.")

CONCLUSION

FL Dye has been waiting for payment on the $10,740 that has been owed to them since April 26, 2004. For ix years FL Dye has been waiting to be paid for the

work that they performed for DiMarzio. The mere fact that they had to prove the existence of the contract is not sufficient justification to deny prejudgment interest; especially in light of the deference to award to make a party whole. Because of DiMarzio, FL Dye has not had the ability to use the funds owed to them at their discretion and therefore has not been made whole. For the reasons stated above, FL Dye respectfully requests that this Court reverse the District Court and award prejudgment interest to fully compensate FL Dye.

RESPECTFULLY SUBMITTED this 22nd day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2010, I served the foregoing upon the following via email and by depositing a copy thereof in the United States mail, postage prepaid, and addressed as follows:

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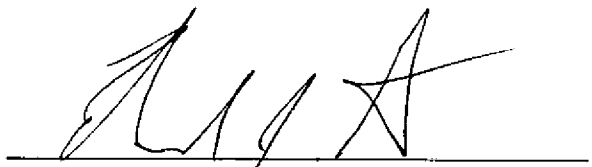

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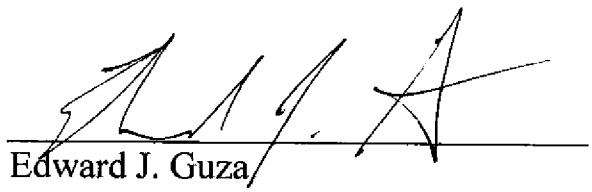
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d), M.R.App.P., I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word 2007, is not more than 10,000 words, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

Dated this 22nd day of July, 2010.



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